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In the Supreme Court of the United States

OCTOBER TERM, 1974

THE EMPORIUM CAPWELL CO., PETITIONER
v.
WESTERN ADDITION COMMUNITY ORGANIZATION, ET AL.

NATIONAL LABOR RELATIONS BOARD, PETITIONER
v.
WESTERN ADDITION COMMUNITY ORGANIZATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Respondent's[1] argument in this Court is essentially a plea of confession and avoidance. The question presented by the petitions for writs of certiorari, and accepted by this Court for review, is whether the Company had committed an unfair labor practice by discharging two employees, Hawkins and Hollins, for engaging in concerted

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[1] "Respondent" refers to Western Addition Community Organization.

activities designed to force the Company to bypass the Union, their exclusive bargaining representative, and bargain directly with them over alleged racially discriminatory employment practices. But the basic thrust of respondent's argument here is that that question is not in fact before the Court.

The linchpin of respondent's argument is its factual hypothesis that "the employees' conduct here did not amount to bargaining" (Br. 27) but was merely a "protest * * * intended to publicize * * * their underlying grievance concerning discrimination" (Br. 30). Respondent then proceeds to argue that mere lawful protest activity, not designed to coerce the employer into a separate bargaining relationship with dissident employees, is protected by the proviso to Section 9(a) of the National Labor Relations Act, 29 U.S.C. 159(a), and Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a). We do not here question the validity of that conclusion;[2] we do, however, question its relevance to this case.

The Board expressly found, directly contrary to respondent's hypothesis, that "[t]he evidence * * * establishes that this was no mere presentation of a grievance, but nothing short of a demand that the [Company] bargain with the picketing employees for the entire group of minority employees" (Pet. App. 103-104; see, also, Pet. App. 55).[3] Thus necessarily implicit in respondent's

[2]The Board here takes no position on the question whether Section 9(a) of the National Labor Relations Act protects picketing or other coercive activities engaged in to force an employer to hear a grievance outside the normal grievance procedures established in the collective bargaining agreement. Cf. *Black-Clawson Co., Inc.* v. *International Association of Machinists*, 313 F. 2d 179, 185 (C.A. 2).

[3]Respondent also contradicts other findings of the Board. For example, respondent states flatly that "no picketing occurred in this case" (Br. 35, n. 38), whereas the Board expressly found that the discharged employees had twice picketed the Company's store (Pet. App. 86-89) and the court of appeals accepted that finding (Pet. App. 8-10, 29).

argument is the contention, never expressly stated, that that finding is not supported by substantial evidence.[4]

a. Respondent's contention does not support the judgment of the court of appeals. Under that court's holding, the Company would have been justified in discharging the two employees if the Union had been remedying the alleged employment discrimination "to the *fullest extent possible by the most expedient and efficacious means*" (Pet. App. 28; emphasis in the original). The court accordingly remanded the case to the Board for the making of the necessary factual determination concerning the Union's efforts to remedy discrimination. See Pet. App. 27-28. In contrast, the logic of respondent's contention is that the employees' activities were privileged irrespective of the Union's efforts and therefore does not support such a remand.

In the absence of a cross-appeal or cross-petition, appellees and respondents normally are not entitled to advance arguments that do not support the judgment under review. See *Strunk* v. *United States*, 412 U.S. 434, 437; *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516, 521; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4. We are persuaded, however, that a responding party who is willing to accept the judgment of a lower court should "be under no obligation to file a petition or cross-petition as a protective measure in the event his opponent should seek Supreme Court review." Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763, 779 (1974). Respondent is willing to accept the judgment below. See

[4]The same contention underlies the argument of two of the three *amici curiae* who support respondent. See pp. 10-16 of the brief of the Department Store Employees Union, Local 1100; pp. 8-9 of the brief of Wayne State University Clinical Law Program in Employment Discrimination.

Resp. Br. 51.[5] Thus we do not believe that respondent's mere failure to cross-petition should bar it from challenging the Board's finding in this Court.

At the same time, however, this "Court's exercise of its discretion not to decide certain issues reasonably extends to non-certworthy points raised by respondents as well as those raised by petitioners." Stern, *supra*, 87 Harv. L. Rev. at 778. That discretion should be exercised here to deny respondent's request that this Court review the Board's factual findings to determine whether they are supported by substantial evidence. Respondent's challenge to the Board's findings was considered and rejected by the court of appeals (Pet. App. 24, n. 34; 42-43) and warrants no further review. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.[6]

b. In any event, the Board's finding that the discharged employees had been attempting to coerce the Company into entering a separate bargaining relationship is amply supported by the evidence. We recited that evidence in our opening brief (pp. 7-9), and it was summarized by the hearing examiner as follows (Pet. App. 104):

> [The dissenting employees' objective] is shown by Hollins' meeting with [the Company's] president, Batchelder, in which he told the latter that he wanted to "discuss what was happening among minority employees," his later insistence that those picketing would be satisfied with nothing less than a meeting with Batchelder, and Hawkins' testimony that those picketing were seeking to "talk to the top management to get better conditions for The Emporium," that those picketing were seeking to accomplish their objectives through "group talk and through the president if we could talk to him."

[5]Respondent would not in any event be entitled to a modification of the judgment below. If this Court concluded, on the basis of respondent's arguments, that the Board's finding is not supported by substantial evidence, respondent would be entitled only to an affirmance of the judgment below ordering remand to the Board on the question of the Union's efforts. See generally Stern, *supra*, 87 Harv. L. Rev. at 772-777.

[6]Denial of review is especially appropriate where, as here, the respondent's evidentiary contention was not made in its opposition to the petitions for certiorari.

Respondent contends (Br. 32) that this evidence shows only that the dissenting employees were presenting a grievance, not that they were attempting to bargain. That contention overlooks the basic differences between grievances and bargaining. Grievances pertain to "specific maladjustments of a detailed or individual quality" (*Elgin, J. & E.R. Co.* v. *Burley*, 325 U.S. 711, 724) that have arisen under an existing agreement. In contrast, bargaining looks "to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past" (*id.* at 723) and is conducted on behalf of a class of employees.

It is clear that the dissident employees here were not complaining of "specific maladjustments of a detailed or individual quality." They expressly refused to "speak as individuals" (A. 25) or to present testimony regarding individual grievances (A. 25, 35-36, 59-60). They were not even contending that they had been subject to discrimination. Indeed, Hollins had been offered, and had refused, a permanent supervisory position (A. 44, 63). Nor were they attempting to present the particular claims of any other employee.

Instead, the dissident employees were attempting to negotiate with management to effect "some basic change that would benefit the treatment of all minority people" (A. 61). That endeavor bespeaks collective bargaining, not the presentation of grievances. See *National Labor Rela-*

tions Board v. *Tanner Motor Livery, Ltd.*, 419 F. 2d 216, 218 (C.A. 9).[7]

2. The National Urban League and the Southern Christian Leadership Conference (hereinafter collectively referred to as "the League"), in their joint brief as *amici curiae*, argue that, since the parties to a Title VII action may negotiate a settlement out of court, it necessarily follows that, even prior to the filing of a Title VII charge, minority employees have a right to bargain separately with their employer over "matters cognizable in a proceeding under Title VII" (Br. 23). But the League's premise falls far short of establishing that conclusion.

a. The League's argument ignores the structure of Title VII. An individual aggrieved by employment discrimination is not initially entitled to bring suit under Title VII; the procedure established under Title VII requires that the aggrieved individual first file charges of unfair employment practice with the Equal Employment Opportunity Commission. Congress had hoped that the elimination of employment discrimination on account of race would be achieved primarily through conciliation and persuasion, rather than through judicial enforcement, and it therefore vested the Commission with "authority to investigate individual charges of discrimination, [and] to promote vol-

[7]The Union, in its brief as *amicus curiae* (pp. 10-16), suggests that the Company was unaware of the dissident employees' bargaining objective and cites the fact that the Company's warnings contained no explicit reference to such an objective. But the employees, through their statements to Company representatives and to the public (see pp. 7-9 of our opening brief), had fully acquainted the Company with their intentions. The warning notices, moreover, did inform the employees that "[t]here are ample legal remedies to correct any discrimination you may claim to exist" (A. 106), thus indicating the Company's understanding that the employees were not merely attempting to present a grievance under the collective bargaining agreement. The Board properly concluded that "[t]he reference to legal remedies is reasonably construed as meaning that [the employees'] course of action lay outside the terms of the bargaining agreement which [the Company] and the Union were bound to follow" (Pet. App. 105, n. 15). The Company was not required to make any more explicit reference to the employees' unlawful objective.

untary compliance with the requirements of Title VII * * *." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44.. The aggrieved individual ordinarily is empowered to bring suit only if the Commission does not obtain voluntary compliance within 180 days. 42 U.S.C. (1970 ed., Supp. II) 2000e-5(f).

The statutory structure thus evinces a strong preference for orderly, non-adversarial resolution of employment discrimination claims through third-party conciliation. Accordingly, we do not believe that Title VII unqualifiedly protects the kind of coercive self-help measures utilized by the dissident employees here. We recognize, of course, that in many situations such measures are both appropriate and entitled to protection. But we believe that, at least prior to the initiation of suit,[8] such measures are unprotected when they conflict with other important statutory policies or interfere with the exercise of other statutory rights.

b. The League's argument in any event proceeds on the erroneous assumption that the authority of the exclusive bargaining agent is interfered with as much by the negotiated settlement of a Title VII action as by separate bargaining by dissidents prior to the filing of any Title VII charges. Negotiated settlements normally do not interfere with the authority of the exclusive bargaining representative, for the simple reason that in practice the bargaining representative is a party to the Title VII action and joins in the settlement.[9] As a consequence, the terms of

[8]The Board takes no position on the question whether Title VII protects picketing or other coercive measures utilized to induce an employer to settle a pending Title VII action.

[9]Indeed, several courts have held that in some cirmcumstances the bargaining representative is an indispensable party under Rule 19, Fed. R. Civ. P. See *Le Beau* v. *Libby-Owens-Ford Co.*, 484 F. 2d 798 (C.A. 7); *Lynch* v. *Sperry Rand Corp.*, 62 F.R. D. 78 (S.D. N.Y.); *Equal Employment Opportunity Commission* v. *United States Pipe and Foundry Co.*, 375 F. Supp. 237 (N.D. Ala.). But see *Equal Employment Opportunity Commission* v. *Eagle Iron Works*, No. 73-116-1, decided July 2, 1974 (8 FEP

the settlement are effectively integrated into the collective bargaining agreement. The negotiation of a settlement is therefore compatible with the unitary collective bargaining relationship guaranteed by Section 9 of the National Labor Relations Act. The fragmentation of the bargaining unit threatened by separate bargaining (see pp. 20-26 of our opening brief) is for that reason unlikely to occur merely as a result of the process of negotiating the settlement of a Title VII action.

For the foregoing reasons, and also for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Cases 344) (S.D. Ia.). Cf. *National Liquorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 363; *United States* v. *Sheet Metal Workers International Association, Local Union No. 36*, 416 F. 2d 123, 132, n. 16 (C.A. 8).